No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the United States Constitution prohibit a white criminal defendant from exercising his peremptory strikes in a racially discriminatory manner?

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provision	2
Statement of the Case	2
Summary of the Argument	3
Argument	3
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES CITED:

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) 4, 12, 13

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979), *cert. denied*, 444 U.S. 881 (1979) 11

Edmondson v. Leesville Concrete Company, Inc., 500 U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) 4, 5, 9, 10, 12

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) 9

Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) 12

People v. Kern, 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990), *cert. denied*, 111 S.Ct. 77 (1990) 11, 13

People v. Pagel, 186 Cal. App. 3d Supp. 1, 232 Cal. Rptr. 104 (1986), *cert. denied*, 481 U.S. 1028 (1987) 11

Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) 4, 6, 7, 8, 12, 13

State v. McCollum, 261 Ga. 473, 405 S.E.2d 688 (1991) 1, 3, 5, 10

State v. Neil, 457 So.2d 481 (Fla. S.Ct. 1984) 11

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) 9, 10

United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), *reh. granted* 930 F.2d 695 (1991) 5

United States v. Greer, 939 F.2d 1076 (5th Cir. 1991), *reh. granted* ___ F.2d ___ (Dec. 3, 1991) 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AMENDMENTS CITED:

U.S. Const. amend. IV 12

U.S. Const. amend. V 12

U.S. Const. amend. VI 12, 14

U.S. Const. amend. XIV 2, 3, 4

CONSTITUTIONAL ARTICLES CITED:

Ga. Const. art. I, § 1, ¶2 7

Ga. Const. art. I, § 2, ¶1 8

Ga. Const. art. V, § 3, ¶1 8

STATUTES CITED:

28 U.S.C. § 1257 1

1833 Ga. Laws, Cobb's 1851 Digest, p. 835 10

O.C.G.A. § 15-12-160 2

O.C.G.A. § 15-12-165 ..... 2, 10

O.C.G.A. § 16-5-21 2

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OPINION BELOW

The Georgia Supreme Court's decision is reported as *State v. McCollum*, 261 Ga. 473, 405 S.E.2d 688 (1991).

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review a state criminal appeal.

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

Respondents Thomas McCollum, William McCollum, and Ella McCollum – who are white – were indicted on August 10, 1990, for several assaultive crimes against Jerry and Myra Collins, who are black (J.A. 2-5, 6, 14).

According to the latest published census, Dougherty County's population is 43% black (J.A. 9-10). In Georgia, forty-two jurors are empaneled in a felony trial. O.C.G.A. § 15-12-160. Since aggravated assault carries a potential punishment of twenty years imprisonment, O.C.G.A. § 16-5-21, the McCollums will have twenty peremptory strikes and the State ten. O.C.G.A. § 15-12-165.

The State filed a pretrial motion to prohibit the McCollums from exercising their peremptory strikes in a racially discriminatory manner (J.A. 6-8). The State pointed out that if the jury panel at the McCollums' trial mirrors the racial makeup of Dougherty County, there will be eighteen black persons on the panel (J.A. 7). Therefore, the McCollums potentially will be able to remove with their twenty peremptory strikes all black persons from the panel and be tried by an all-white jury (J.A. 7).

The trial court denied the State's motion but certified the issue for immediate review (J.A. 14-15). The Georgia Supreme Court granted an interlocutory appeal (J.A. 16-17), but on July 12, 1991, in a 4-3 decision, affirmed the trial court (J.A. 46-57). *State v. McCollum*, 261 Ga. 473, 405 S.E.2d 688 (1991).

This Court granted Georgia's petition for writ of certiorari on November 4, 1991.

SUMMARY OF THE ARGUMENT

A juror's Fourteenth Amendment right to equal protection is violated when a criminal defendant uses a peremptory strike to remove that juror for racially discriminatory reasons. The prosecutor, on behalf of the State, has standing to object to the criminal defendant's discriminatory exclusion of the jurors.

Racial discrimination by a criminal defendant within the courtroom calls into question the fairness and integrity of the criminal justice system and prevents jurors, merely because of their race, from participating in jury service, one of our significant democratic institutions.

ARGUMENT

A. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO ELIMINATE FURTHER RACIAL DISCRIMINATION IN JURY SELECTION.

Earlier this year this Court noted there has been "over a century of jurisprudence dedicated to the

elimination of race prejudice within the jury selection process." *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. 2077, 2081-82, 114 L.Ed. 2d 660, 672 (1991). Less than six years ago this Court ruled that a prosecutor's racially discriminatory exercise of peremptory strikes to remove black jurors from the panel violates a black defendant's Fourteenth Amendment right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Justice Powell's opinion specifically did not reach the issue of whether defense counsel is similarly limited in the exercise of peremptory strikes. *Batson v. Kentucky*, 476 U.S. at 89 n. 12, 106 S.Ct. at 1719 n. 12, 90 L.Ed.2d at 82 n. 12.

Two dissenters in *Batson*, then Chief Justice Burger joined by the present Chief Justice, asked rhetorically that if prosecutors are limited, can this Court rationally hold that defendants are not. *Batson v. Kentucky*, 476 U.S. at 126, 106 S.Ct. at 1738, 90 L.Ed.2d at 107. In his concurring opinion, Justice Marshall stated:

> Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95.

This Court has now ruled that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding black jurors on the basis of race. *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Then, approximately two months after *Powers*, this Court

decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). In his dissent Justice Scalia stated, "The effect of today's decision . . . logically must apply to criminal prosecutions. . . ." *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2095, 114 L.Ed.2d at 689.

Although the panel decisions have been vacated by the granting of rehearings en banc, two federal circuits had prohibited criminal defendants from exercising peremptory strikes in a racially discriminatory manner. *See, e.g., United States v. De Gross*, 913 F.2d 1417, 1420 (9th Cir. 1990), *reh. granted* 930 F.2d 695 (1991); *United States v. Greer*, 939 F.2d 1076, 1086 (5th Cir. 1991), *reh. granted* ___ F.2d ___ (Dec. 3, 1991).

Therefore, the question left unanswered in *Batson* is squarely presented in the present case. The McCollums, who are white, have been indicted for assaultive crimes against black victims. Counsel for the McCollums have clearly indicated their intention to use their peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case give them the right to exclude black citizens from participating as jurors in the trial of this case (J.A. 35-37). The Georgia Supreme Court upheld the "right" of McCollums' counsel to exercise their peremptory strikes in this fashion. *State v. McCollum*, 261 Ga. 473, 405 S.E. 2d 688 (1991).

Georgia submits that the McCollums' position is unconstitutional. With this case, this Court can further

advance the elimination of racial discrimination within the jury selection process.

B. THE STATE ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA, HAS STANDING TO RAISE THE CONSTITUTIONAL CLAIMS OF BLACK JURORS SUBJECTED TO RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS.

This Court has unequivocally declared that, under the Equal Protection Clause, individual jurors "possess the right not to be excluded from [a petit jury] on account of race." *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1370; 113 L.Ed.2d at 424. In this case, absent relief from this Court, black potential jurors will be deprived of that right.

This Petition is brought, not by black potential jurors, but by Michael J. Bowers, Attorney General, on behalf of and in the name of the State of Georgia. It is submitted that Petitioner has standing to bring this case on behalf of the black citizens of Georgia who are the targets of racial discrimination in this case.

In *Powers v. Ohio, supra*, this Court held that a white criminal defendant had standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. There was cognizable injury in *Powers* because of the damage done, not to the defendant as an individual, but to the criminal justice system. *Powers v. Ohio*, 500 U.S. at ___, 111 S.Ct. at 1371, 113 L.Ed.2d at 425-26.

The trial court and the Georgia Supreme Court have both given approval to the announced intention of

Respondents' counsel to discriminate against black Georgia citizens. The effect of the decision of the Georgia Supreme Court is to institutionalize this form of racial discrimination in Georgia law. Moreover, the damage to the criminal justice system is just as great when the defendant uses his peremptory strikes in a racially discriminatory fashion, as when a prosecutor does so. Where the community judges that criminal cases are decided by jurors who are unrepresentative and unfair, an acquittal perceived to be tainted by racial discrimination is just as damaging as an unfair conviction would be.

In the McCollums' case there has not been a jury verdict. However, once the State received an adverse pretrial ruling in the trial court (J.A. 14-15), the only way the State could prevent the racial discrimination was to seek interlocutory review. If the McCollums' case had gone to trial and there had been an acquittal, jeopardy would have attached and the State could not appeal. Even if there were to have been a conviction of the McCollums, the State as appellee could not have appealed an adverse trial court ruling permitting racially discriminatory peremptory strikes by a criminal defendant.

In *Powers v. Ohio, supra*, this Court held that the relationship of a white criminal defendant to potential jurors is sufficiently close for the defendant to assert the equal protection rights of the excluded black juror. Certainly the prosecutor has a relationship to potential jurors that is equally as close as that of the white criminal defendant. The Petitioner's relationship to potential jurors in this case is, it is submitted, *closer* than the relationship approved in *Powers*. Art. I, § 1, ¶2 of the 1983 Georgia Constitution establishes the relationship between

Georgia citizens and their state government: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

In addition, the McCollums are being prosecuted by a government official, the Attorney General, on behalf of and in the name of the State. In Georgia the Attorney General is a statewide elected official. Ga. Const. Art. V, § 3, ¶ 1. Georgia's "[p]ublic officers are the trustees and servants of the people. . . . " Ga. Const. Art. I, § 2, ¶ 1. The relationship of Petitioner to black potential jurors is sufficiently close for the Attorney General to assert, on behalf of the State, the equal protection rights of these persons.

Although individuals excluded from jury service on the basis of their race have a right to bring suit on their own behalf, the "barriers to such a suit by an excluded juror are daunting." *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1373, 113 L.Ed.2d at 427. As a practical matter, unless a prosecutor has standing to challenge the defense's use of peremptory strikes in a racially discriminatory manner, it is likely that the practice will go unchallenged. It is both legally consistent and fair for a prosecutor (in this case the State Attorney General), whose duty it is to prosecute for the violation of crimes as defined by the people's elected representatives, to have standing, on behalf of and in the name of the State, to challenge a criminal defendant's racially discriminatory exercise of peremptory strikes.

C. THE USE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER INVOLVES STATE ACTION, VIOLATES THE EQUAL PROTECTION RIGHTS OF THE JURORS AND UNDERMINES THE PUBLIC'S CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

The McCollums, Respondents in this case, successfully asserted in the Georgia Supreme Court that the circumstances of their case give them the right to exclude black citizens from participating as jurors in the trial of this case (J.A. 35-37). This position is untenable in law, logic or policy. The use of peremptory strikes in a racially discriminatory manner by a white criminal defendant violates the United States Constitution, and undermines public confidence in our criminal justice system. Such a practice deprives citizens, on the basis of their race, of their important right to participate in the administration of justice. This practice reflects discredit on our legal system in that it creates opportunities for the outcome of criminal cases to be manipulated, so that "justice" may vary depending upon the race of the defendant and of the victim.

"The peremptory challenge has very old credentials." *Swain v. Alabama*, 380 U.S. 202, 212, 85 S.Ct. 824, 831, 13 L.Ed.2d 759, 768 (1965). Although peremptory challenges are rarely used in England today, their history in English law goes back several hundred years. *Swain v. Alabama*, 380 U.S. at 213, 85 S.Ct. at 832, 13 L.Ed.2d at 769, Yet this Court has also noted that *peremptory challenges are not of constitutional origin. Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2083, 114 L.Ed.2d at 673; *Gray v. Mississippi*, 481 U.S. 648, 663, 107 S.Ct. 2045,

2054, 95 L.Ed.2d 622, 636 (1987); *Swain v. Alabama*, 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 772.

In Georgia, peremptory strikes are statutory in origin. This law is presently codified at O.C.G.A. § 15-12-165, a statute which has remained essentially unchanged in Georgia law since 1833. *See* 1833 Ga. Laws, Cobb's 1851 Digest, p. 835. Despite this lengthy statutory history in Georgia, the peremptory strike has no state constitutional foundation. *See State v. McCollum*, 261 Ga. at 475, 405 S.E.2d at 690 (Hunt, J. dissenting.)

No private party can exercise peremptory challenges without overt, significant assistance of the trial court, and the exercise of these strikes involves State action. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675. The State summons the jurors and subjects the jurors to public scrutiny and examination during the voir dire. *Id.* Once the peremptory strike, which is granted by State statute, is exercised, the trial court excuses the juror, thus ultimately denying the juror the opportunity to serve on the petit jury. *Id.*

When any person is excluded from jury service solely on the basis of his or her race, whether by the prosecution or the defense, that person is deprived of an important right of citizenship. When the mechanism for this discrimination is a peremptory strike in a court of law, this deprivation of rights is perpetrated under state auspices and with the state's imprimatur. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675-76. It is no less a violation of

the constitutional rights of potential jurors if this deprivation is instigated by the defense rather than the prosecution.

Several State appellate courts have ruled that their respective state constitutions prohibit a criminal defendant from exercising peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Kern*, 555 N.Y.2d 647, 655, 554 N.E.2d 1235, 1243 (1990), *cert. denied*, 111 S.Ct. 77 (1990); *State v. Neil*, 457 So.2d 481, 487 (Fla. S.Ct. 1984); *People v. Pagel*, 186 Cal App. 3d Supp. 1, 232 Cal. Rptr. 104, 106-07 (1986), *cert. denied*, 481 U.S. 1028 (1987); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, 517 n.35 (1979), *cert. denied*, 444 U.S. 881 (1979). Georgia has been able to locate only one appellate court decision – its own – which has ruled a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner.

Because peremptory strikes have such a long history, an argument can be made that the availability of peremptory strikes is a significant part of what is conceived of as a "fair trial." However, it is submitted that it would be an affront to justice to argue that the notion of a "fair trial" includes the right to discriminate against a group of citizens based upon their race. In fact, it is difficult to envision a practice that would be more at odds with the concept of "fairness" in a court of law.

A criminal defendant in Georgia is granted significant federal and state constitutional protection. He is presumed innocent, and the burden is upon the State to prove his guilt beyond a reasonable doubt. The jury must be impartial. The defendant cannot be forced to testify,

nor can the State comment on his failure to testify. Evidence gained from searches and seizures or from custodial interrogation may be suppressed or excluded if there are Fourth, Fifth or Sixth Amendment violations. The State must disclose exculpatory evidence to the defendant along with any promises or inducements to the State's witnesses. Before a defendant can be convicted, there must be a unanimous verdict of guilty by twelve jurors. These protections ensure a fair trial; the notion of a fair trial does not include the right to engage in racial discrimination. Defense counsel is limited to "legitimate, lawful conduct," *Nix v. Whiteside*, 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123, 134 (1986); and should not be permitted to engage in racially discriminatory peremptory strikes.

When a juror is peremptorily struck for a racially discriminatory reason, the juror is unfairly deprived of the opportunity to participate in one of our significant democratic institutions. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2082, 114 L.Ed.2d at 672. A person's race is irrelevant to the person's fitness as a juror. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.

Powers v. Ohio. 499 U.S. at ___, 111 S.Ct. at 1368, 113 L.Ed.2d at 422. Just as a juror's equal protection rights are violated when the prosecutor or private litigants strike the juror for racially discriminatory reasons, the juror's rights are similarly violated when the criminal defendant

exercises the peremptory strike for racially discriminatory reasons.

If systematic discrimination against members of a particular race is tolerated in jury selection, damage is done to the public's confidence in the integrity of our system of justice. Racial discrimination in the courtroom raises serious questions as to the fairness of the proceedings and undermines public confidence in the criminal justice system. *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1371, 113 L.Ed.2d at 425; *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Just as public confidence in criminal justice was undermined by a conviction in a trial where racial discrimination occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.

Whether the result of the trial is a conviction or acquittal, the public is entitled to the legitimate expectation that the trial was fair and the jury was biased neither in favor of the State nor the defendant. In the trial over the highly publicized "Howard Beach incident" the white defendants were convicted of second degree manslaughter and first degree assault of minority victims. *People v. Kern*, 555 N.Y.S.2d at 658, 554 N.E.2d at 1246. In a case of such a nature, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is an absolutely essential element in preserving community peace and cohesion in such cases. In the "Howard Beach" prosecutions, New York courts did not allow the white defendants to exercise their strikes in a racially discriminatory manner. Had the policy of the New York courts been

otherwise, the convictions on lesser included offenses might well have been the cause of increased alienation and hostility among segments of the affected community. The "Howard Beach incident" illustrates why there should be no tolerance of the practice of racial discrimination by means of peremptory strikes. Such a practice has real and tragic potential for making the criminal justice system a divisive force in society, rather than a unifying one.

Under the Sixth Amendment, a criminal defendant is entitled to a trial "by an impartial jury." The defendant is not entitled under the Sixth Amendment to trial before a jury chosen for its racial characteristics. The criminal defendant is not entitled under the Sixth Amendment to racially discriminate against other citizens, thereby depriving them of their constitutional rights. The guarantee of a fair trial protects both the defendant and society. The Sixth Amendment is not an instrument the defendant may use to save himself by harming society. The guarantee of a fair trial simply does not give a defendant a "right" to exercise his peremptory strikes in a racially discriminatory manner.

CONCLUSION

Georgia respectfully requests this Court reverse the Georgia Supreme Court and rule that a criminal defendant is constitutionally prohibited from exercising his peremptory strikes in a racially discriminatory manner.

Respectfully submitted,

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